

Message Text

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ACTION EUR-12

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C O R R E C T E D C O P Y F O R P A R A T W O

E.O. 11652: N/A
TAGS: MARR NATO
SUBJECT: DISCRIMINATORY PRACTICES AGAINST US FIRMS

REF: STATE 186215 (DTG 081758Z AUG 77)
SUMMARY: WE ARE NOT AWARE OF ANY NEW REPEAT NEW DISCRIMINA-
TORY STEPS TAKEN BY OUR NATO ALLIES AGAINST US INDUSTRY. IN
FACT, OUR EFFORTS OVER THE LAST SEVERAL YEARS HAVE RESULTED
IN RELAXATION OF CERTAIN DISCRIMINATORY MEASURES WHICH HAD
BEEN APPLIED FORMERLY. WE ARE, HOWEVER, SADDLED WITH THE
ACCEPTED NATO PRINCIPLE THAT IN GENERAL ONLY FIRMS FROM
NATO NATIONS CONTRIBUTING TO A PARTICULAR NATO PROGRAM CAN
PARTICIPATE WITHOUT DISCRIMINATION IN INTERNATIONAL COMPE-
TITIVE BIDS (ICB) UNDER THAT PROGRAM. END SUMMARY.

1. THE MISSION HAS BEEN TRADITIONALLY INVOLVED IN EFFORTS
TO REMEDY DISCRIMINATORY PROCUREMENT PRACTICES WITHIN NATO
AGAINST US FIRMS. OUR PRINCIPAL SUCCESSES HAVE BEEN IN
COMMONLY-FUNDED PROGRAMS SUCH AS NATO'S MILITARY BUDGET AND
INFRASTRUCTURE PROGRAMS WHERE MOST RECENT AGREEMENTS AND
ICB RULES ELIMINATE THE LAST VESTIGES OF OFFICIAL DISCRIMI-
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NATION SUCH AS CUSTOMS, TAXES, LOCAL REGULATIONS, ETC.
NEVERTHELESS, EVEN IN THESE RELATIVELY PURE AREAS, THE
RULES EXCLUDE BIDDERS FROM NATIONS (SUCH AS FRANCE) WHICH
DO NOT CONTRIBUTE TO THE FUNDING.

2. THE NATO MAINTENANCE AND SUPPLY AGENCY (NAMSA) PROCURE-
MENT REGULATIONS GENERALLY PROVIDE THAT INVITATIONS TO BID

BE SENT TO QUALIFIED FIRMS OF ALL NAMSO MEMBER COUNTRIES WITHOUT RESTRICTION AS TO FINANCIAL PARTICIPATION IN INDIVIDUAL PROGRAMS. DIRECTIVES FOR NAMSA PROCUREMENT FOR INDIVIDUAL WEAPONS SYSTEMS PARTNERSHIPS (WSP) WITHIN NAMSO, EACH OF WHICH HAS ITS OWN MEMBERSHIP, REQUIRE UNANIMOUS APPROVAL BY THE NAMSO BOARD OF DIRECTORS. THESE DIRECTIVES CAN, HOWEVER, DEPART FROM THE NORMAL RULE AND RESTRICT THE COUNTRIES WHOSE FIRMS ARE INVITED TO BID, AS IN THE CASE OF THE DRONE WSP, OR PROVIDE FOR A PREFERENCE, AS IN THE CASE OF THE HAWK WSP. ANOTHER EXCEPTION TO THE GENERAL RULE OCCURS IN NAMSA PROCUREMENT ON BEHALF OF A SINGLE CUSTOMER COUNTRY ON A "BROKERAGE" BASIS - NOT AS A PART OF A NAMSA PROGRAM - IN WHICH CASE NAMSO WOULD NORMALLY ACCEDE TO A LIMITATION REQUESTED BY THE CUSTOMER COUNTRY. OBVIOUSLY, ANY MEMBER OF THE BOARD OF DIRECTORS WHO WAS WILLING TO LIVE WITH THE POLITICAL FALLOUT COULD VETO ACCEPTANCE OF A PROCUREMENT DIRECTIVE, AT THE RISK OF LOSING THE BUSINESS FOR NAMSA.

3. PROCUREMENT FOR THE HAWK MANAGEMENT ORGANIZATION WAS TRANSFERRED TO NAMSA RELATIVELY RECENTLY AND, EVEN AFTER FORMATION OF A HAWK WSP WITHIN NAMSO, THE EARLIER HAWK AGENCY PREFERENTIAL PROCUREMENT RULES WERE RETAINED. WE BECAME AWARE OF THE DISCRIMINATORY PRACTICES ONLY AFTER THE US FIRM, VARIAN ASSOCIATES, BROUGHT ITS CASE TO OUR ATTENTION. VARIAN HAD BEEN INVITED TO BID ON A KLYSTRON LIMITED OFFICIAL USE

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PROCUREMENT, BUT THE COMPARISON OF VARIOUS ELEMENTS IN THE COMPETING BIDS LEFT MUCH TO BE DESIRED FROM THE STANDPOINT OF FAIRNESS AND OBJECTIVITY, EVEN AFTER TAKING INTO ACCOUNT A 15 PERCENT PREFERENCE IN FAVOR OF EUROPEAN FIRMS. MOREOVER, THE HAWK BOARD OF DIRECTORS, ON WHOSE BEHALF NAMSA WAS PROCURING THE KLYSTRONS, RESERVED TO ITSELF THE RIGHT TO APPROVE ANY PROPOSED AWARD, THUS MAINTAINING A VERITABLE VETO WHICH FRANCE WAS FREE TO EXERCISE IN FAVOR OF A FRENCH FIRM AGAINST ANY PROPOSED AWARD TO VARIAN. THIS MEANT THAT THE US FIRM'S RIGHT TO SUBMIT A BID WAS A MERE SHAM AND THAT THE ONLY POSSIBLE USE SERVED WAS TO KEEP EUROPEAN BIDS "IN THE BALLPARK".

4. WE WERE HANDICAPPED BY THE FACT THAT COUNTRIES, WHO WERE PAYING FOR THE MATERIEL, WERE CLEARLY FREE, UNDER RECOGNIZED NATO NORMS, TO LIMIT DISTRIBUTION OF REQUESTS FOR QUOTATION (RFQ) TO HAWK COUNTRIES, THUS EXCLUDING ANY US FIRM ALTOGETHER. THE UNFAIRNESS AROSE FROM PROVIDING AN RFQ TO A US FIRM, LEADING IT TO INVEST IN THE EFFORT TO PREPARE AND SUBMIT A BID IN THE BELIEF THAT IF THE FIRM WERE THE LOW BIDDER IT WOULD BE AWARDED THE CONTRACT. IN FACT, IT NEVER HAD A CHANCE. THE MISSION BROUGHT THIS STATE OF

AFFAIRS TO THE ATTENTION OF THE SECRETARY GENERAL IN AUGUST OF 1974, AND IT BECAME THE SUBJECT OF THE NATO BOARD OF AUDITORS' SPECIAL REPORT ON THE PROCUREMENT OF KLYSTRONS TYPE P.N. 10.17/61-190 BY THE NATO HAWK PRODUCTION AND LOGISTIC ORGANIZATION (NHPLO) (BAI(AR-103/73)2584, OF 2 OCTOBER 1974).

5. IN THE INTERIM, THE MISSION, THROUGH THE US REPRESENTATIVE ON THE NAMSO BOARD OF DIRECTORS, WAS ENGAGED IN INTENSIVE EFFORTS TO BRING SOME FAIRNESS AND ORDER OUT OF THE DISORDER AND OBVIOUS UNFAIRNESS IN THE HAWK PROCUREMENT RULES. THE RESULT IS PARAGRAPH 6 OF NAMSO DOCUMENT NM(77)BOD/10. THOSE PROVISIONS ENSURE THAT NAMSA MUST IN-

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FORM A PROSPECTIVE US BIDDER OF ANY PREFERENCE IN FAVOR OF EUROPEAN FIRMS AND OF THE MAXIMUM PERCENTAGES INVOLVED. THE RULES STILL REQUIRE SUBMISSION OF A PROPOSED AWARD TO THE HAWK COUNTRIES, BUT ANY OBJECTION TO A PROPOSED AWARD IS TO BE LIMITED (BY NAMSA IMPLEMENTING REGULATIONS STILL TO BE PROMULGATED) TO FAILURE TO COMPLY WITH THE NEWLY PRESCRIBED PROCEDURE. PENDING ISSUANCE OF THE IMPLEMENTING REGULATIONS, THE US HAS A RESERVATION ON PARAGRAPH 6 WHICH IS TO BE LIFTED AUTOMATICALLY ON APPROVAL OF THE IMPLEMENTING REGULATIONS. IN THE INTERIM, WE HAVE AGREED TO IMMEDIATE IMPLEMENTATION OF THE NEW PROCEDURE, SINCE IT IS MORE FAVORABLE TO US INTERESTS THAN THE OLD ONE. ALL OF THE DEVELOPMENTS WITHIN THE NAMSO FRAMEWORK HAVE BEEN TAKEN AFTER THE CLOSEST CONSULTATION AND COOPERATION BETWEEN THE MISSION AND SENIOR OFFICERS AND EMPLOYEES OF THE US FIRM CONCERNED.

6. MOST NATO PRODUCTION AND LOGISTIC ORGANIZATIONS (NPLO) ARE INVOLVED IN PROCUREMENT OF SYSTEMS WHEREIN EITHER THE US IS NOT A FINANCIAL CONTRIBUTOR (AS IN THE CASE OF HAWK) OR THE US SUPPLIES MORE OF WHAT THE AGENCY PROCURES THAN ITS SHARE OF THE COST (AS IN THE CASE OF NAMSA). THUS, OUR PARTNERS GENERALLY REGARD MEASURES TO ENSURE SOME PARTICI-
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PATION BY THEIR OWN INDUSTRIES AS PERFECTLY PROPER MANI-
FESTATIONS OF PRODUCTION SHARING AND CURRENT EMPHASES ON
THE TWO-WAY-STREET. ADDED TO THIS IS THE FACT THAT US
INDUSTRY, WITH ECONOMIES OF SCALE AND LOWER LABOR COSTS,
IS GENERALLY CONCEDED AN ADVANTAGE IN ANY COMMON PROCURE-
MENT BASED ONLY ON PRICE. ALSO, MOST COUNTRIES SUBSCRIBE
TO THE FRENCH POSITION THAT BID COMPARISONS SHOULD INCLUDE
TAXES AND CUSTOMS DUTIES (THUS DISCRIMINATING AGAINST
NON-NATIONAL OR NON-REGIONAL FIRMS), SINCE THE CUSTOMER
COUNTRIES MINISTERS OF DEFENSE MUST MAKE SUCH PAYMENTS TO
THEIR TREASURIES.

7. WE RECOGNIZE THE NPLO PRACTICES ARE NOT IN CONSONANCE
WITH THE ELIMINATION OF COMPETITIVE LIMITATIONS FOSTERED
BY THE US IN RECENT MOUS WITH INDIVIDUAL NATO NATIONS. ON
THE OTHER HAND, THE MOUS PROVIDE THE OTHER SIDE OF THE
COIN IN ARRANGEMENT FOR "EQUILIBRIUM" OR BALANCING OF PRO-
CUREMENT FROM INDUSTRIES IN BOTH COUNTRIES, A PROVISION
WHICH DOES NOT EXIST IN MOST NATO PROCUREMENT PROCEDURES.

8. WE SUGGEST, THEREFORE, THAT US AGENCIES CONTINUE TO
SEEK OUT OPPORTUNITIES TO ELIMINATE UNFAIR LIMITATIONS
UNDER CURRENT POLICIES. WE SHOULD ALSO MAINTAIN A GENTLE
PRESSURE TOWARD FURTHER LIBERALIZATION OF NATO AND
NATIONAL POLICIES. EVENTUALLY, AFTER WE HAVE ACQUIRED THE
CONFIDENCE OF OUR ALLIES IN US DEVOTION TO STANDARDIZATION
AND THE TWO-WAY-STREET, WE WOULD SEEK TO ELIMINATE ALL
REPEAT ALL DISCRIMINATION IN BOTH MULTILATERAL (SHORT OF
FULL 15 NATION PARTICIPATION) AND EVEN UNILATERAL DEFENSE
PROCUREMENT.

9. COMMENT: WE HAVE ADDRESSED THE EXAMPLE CITED IN SUBPARA
2(A), REFTEL, IN PARAS 3-5, ABOVE. THEY CALL FOR AN AWARD
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TO A PARTICIPATING COUNTRY'S FIRM IF THE DIFFERENTIAL COST
IS NO MORE THAN 15 PERCENT AND AN OPPORTUNITY FOR SUCH A

FIRM TO REDUCE ITS BID IF THE DIFFERENTIAL IS BETWEEN 15
AND 30 PERCENT. WE KNOW OF NO PROCEDURE CALLING FOR AWARD
AT A 40 PERCENT DIFFERENTIAL AS CITED IN SUBPARA 2(B),
REFTEL. END COMMENT.GLITMAN

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